

Challenges and Prospects for Access to Extraterritorial Evidence between Japan and the United States (summary)

Atsushi SHIRAKI

Associate Professor of Law, University of the Ryukyus, Graduate School of Law

With the advancement of globalization, it has become increasingly common for critical evidence to be located outside Japan, not only in cross-border civil litigation pending before the Japanese domestic courts but also in ordinary civil lawsuits in which both parties are Japanese citizens. In order to fully realize the rule of law through civil litigation, it is essential to develop fast, effective, and affordable means of accessing extraterritorial evidence that is available to citizens who do not have sufficient financial resources. This article focuses on the United States, which, among other countries, has a high concentration of multinational companies and global financial institutions, and where access to foreign evidence is particularly problematic in relation to Japan.

The basic approaches to the legislation accessing extraterritorial evidence between Japan and the United States are fundamentally different. Since the end of World War II, Japan has developed a scheme to access foreign evidence based on agreements between sovereigns (a reciprocal approach). On the other hand, the United States has established a unilateral approach based on its own domestic legislation. Specifically, the United States seeks cross-border discovery via the Federal Rules of Civil Procedure in outbound situations, while in inbound situations, 28 U.S.C. § 1782, a federal statute, generously allows the use of discovery, a powerful evidence disclosure system in the United States, not only for foreign and international courts but also for individuals who are parties to these courts, thereby broadly allowing access to evidence located in the United States. As a result, the specific ways to access extraterritorial evidence available to litigants in both countries have become asymmetrical, leading to the complexity of legislation to deal with extraterritorial evidence in both countries.

This article first provides an overview of the current mechanism for extraterritorial evidence legislation in the civil and commercial contexts between Japan and the United States, identifying the issues involved. It then demonstrates the need for enhanced intergovernmental cooperation between Japan and the United States based on a reciprocal approach. Lastly, by analyzing the reach of the jurisdiction to adjudicate for both sovereigns, it identifies specific

areas where cooperation between the two countries is feasible and proposes a cooperative model that is faster, more effective, and affordable.